Internal distribution code:

(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [X] To Chairmen
(D) [-] No distribution

Datasheet for the decision of 24 March 2023

Case Number: T 0423/22 - 3.2.01

Application Number: 09179826.4

Publication Number: 2202099

IPC: B60C23/04

Language of the proceedings: EN

Title of invention:
RFID enabled tire control system and method

Patent Proprietor:
The Goodyear Tire & Rubber Company

Opponent:
MICHELIN Recherche et Technique S.A.

Headword:

Relevant legal provisions:
EPC Art. 117(1)(d)
EPC R. 117, 118

Keyword:
Evidence - public prior use - hearing witness
Taking of evidence - hearing witness by videoconference

Decisions cited:
G 0001/21, T 0393/16, T 1418/17

Catchword:
Hearing a witness in first instance proceedings by videoconference allowed sufficient interaction between the deciding body, the parties and the witness. Albeit a part of the witness' body language was not visible to the participants, this did not amount to an infringement of the parties' right to be heard since the judgement on the witness' credibility was mainly based on the conclusiveness of his/her testimony and the absence of contradictions within the witness' own testimony, between the testimonies of several witnesses and/or contradictions between the witness' testimony and information derivable from supporting documents (reasons, point 2).

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0423/22 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 24 March 2023

Appellant: (Patent Proprietor)	The Goodyear Tire & Rubber Company 200 Innovation Way Akron, OH 44316 (US)
Representative:	Kutsch, Bernd Goodyear S.A. Patent Department Avenue Gordon Smith 7750 Colmar-Berg (LU)
Respondent: (Opponent)	MICHELIN Recherche et Technique S.A. Route Louis Braille 10 1763 Granges-Paccot (CH)
Representative:	Desbordes, Guillaume Manufacture Française des Pneumatiques Michelin CBS/CORP/J/PI - F35 - Ladoux 23, place des Carmes-Déchaux 63040 Clermont-Ferrand Cedex 9 (FR)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 8 December 2021 revoking European patent No. 2202099 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	G. Pricolo
Members:	M. Geisenhofer
	P. Guntz
	H. Geuss
	A. Jimenez

Summary of Facts and Submissions

I. The appeal was filed by the patent proprietor (appellant) against the decision of the opposition division to revoke the patent in suit.

II. Following the order of the board's decision T 393/16 in previous appeal proceedings relating to the present case, the opposition division had summoned the witness, Mr Marques, and had heard him during oral proceedings, *inter alia* on the question of whether, during the prior use "eTire II", the claimed features were disclosed to members of the public.

(a) The oral proceedings and the witness hearing were held by videoconference without the consent of the appellant.

(b) The opposition division came to the conclusion that the prior use "eTire II" had been public.

(c) Moreover, the opposition division accepted the position of the board expressed in T 393/16 and held that the prior use anticipated the subject-matter of claim 1 of the main request and of auxiliary requests 1 - 4, respectively, and rendered obvious the subject-matter of claim 1 of auxiliary request 5.

III. Oral proceedings were held before the board.

(a) The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained in amended form based on the

main request or one of the five auxiliary requests submitted with the statement of grounds of appeal.

Furthermore, the appellant requested that the case be remitted to the opposition division with the order to hear the witness, Mr Marques, in person at the premises of the EPO, or alternatively to hear him in person during oral proceedings before the board.

In case the board denied these requests, the appellant requested that the following question be submitted to the Enlarged Board of Appeal:
"*Ist es im Rahmen eines Verfahrens vor der Einspruchsabteilung mit dem EPÜ vereinbar, einen Zeugen, von dessen Aussage über eine behauptete offenkundige Vorbenutzung der Ausgang des Verfahrens vor der Einspruchsabteilung wesentlich oder ausschließlich abhängt und der überdies ein Mitarbeiter der Muttergesellschaft der Einsprechenden ist, nur per Videokonferenz in den Räumen der Muttergesellschaft der Einsprechenden zu vernehmen, obwohl nicht alle Parteien einer solchen Vernehmung als Videokonferenz zugestimmt haben?*"

Finally, the reimbursement of the appeal fee was also requested.

(b) The respondent (opponent) requested that the appeal be dismissed.

IV. Claim 1 of the **main request** reads as follows:
"*A tire control system for a vehicle (62) having at least one wheel unit, the wheel unit including a wheel rim (32) and a tire (22) mounted to the wheel rim (32), the control system comprising:*

a pass-through portal (50) operatively entered and exited by the vehicle (62);
at least one first antenna (52, 54) positioned within the portal (50) for operatively receiving at least one data transmission,
characterised in that
at least one tire-based RFID tag (10) is mounted to the tire (22) and having a tire serial number stored within a tag memory accessible to an external reader (40);
the first antenna (52, 54) is positioned within the portal (50) for operatively receiving at least one data transmission of the tire serial number from the at least one tire-based RFID tag (10) as the vehicle (62) can move through the portal (50);
at least one first RFID reader (40A, 40B) is coupled to the at least one first antenna (52, 54) for operably reading and storing within a database the tire serial number data; and
a gate mechanism (58) for sensing a movement of the vehicle (62) within the portal (50), the gate mechanism being coupled to the at least one first RFID reader (40A, 40B) for operatively initiating at least one new data collection sequence within the portal (50)."

Claim 1 of **auxiliary request 1** differs from claim 1 of the main request in that the expression "*vehicle (26) can move through the portal (50)*" is replaced by the expression "*vehicle (26) moves through the portal (50)*".

Claim 1 of **auxiliary request 2** differs from claim 1 of the main request in that the expression "*wherein the tire serial number is unique to the tire (22)*" is inserted after "*tag memory*" in the first paragraph of the characterising portion.

Claim 1 of **auxiliary request 3** requires in addition to the stipulations of claim 1 of the main request that the control system comprises the following features: "*at least one vehicle-based RFID tag mounted to the vehicle (62) and having a vehicle serial number stored within a tag memory accessible to an external reader; at least one second antenna positioned within the portal (50) for operatively receiving data transmission of a the vehicle serial number from the at least one vehicle-based RFID tag;*
at least one second RFID reader coupled to the second antenna for operably reading and storing within a database the vehicle serial number data."

Claim 1 of **auxiliary request 4** combines the amendments of auxiliary requests 1 - 3.

Claim 1 of **auxiliary request 5** specifies that the gate mechanism for sensing a movement of the vehicle is "*a light gate (58)*".

V. The appellant's arguments can be summarised as follows:

(a) Hearing the witness by videoconference infringed the appellant's right to be heard.

(i) The Enlarged Board of Appeal held in G 1/21 that the "gold standard" was to hear the witness in person. Deviating from this general principle required a general emergency, which is no longer present; there are no longer any travel restrictions or similar restrictions in place.

(ii) The appellant was not able to judge the credibility of the witness without seeing

him in person. In particular, hearing the witness by videoconference prevented the appellant from seeing the witness's body language.

(b) The following particular circumstances rendered it absolutely necessary for the witness to be heard in person:

(i) Whether the prior use was sufficiently proven was crucial for the outcome of the proceedings.

(ii) The witness was an employee of the opponent.

(iii) The witness was located in the opponent's office when he was heard by the opposition division.

(c) The opposition division erred when it considered the prior use "eTire II" to be sufficiently proven, in particular when it took the view that the prior use occurred in public.

(d) The subject-matter of claim 1 of the main request is novel and inventive over the remaining prior art, the prior use "eTire II" not forming part thereof. The same applies to the claimed subject-matter of auxiliary requests 1 - 5.

VI. The respondent's arguments can be summarised as follows:

(a) The parties' rights to be heard were respected.

(i) Both the opposition division and the parties had the opportunity to ask the witness questions regarding the alleged prior use and the circumstances thereof. Furthermore, they both had the chance to question the witness as to his relationship with the opponent, in order to evaluate his credibility.

(ii) Hearing the witness by videoconference was close to hearing him in person. Although a videoconference was not the "gold standard" within the meaning of G 1/21, it was sufficiently close.

(b) The reasons provided by the appellant do not justify special circumstances requiring the witness to be heard in person:

(i) Any attack in opposition proceedings aims at revoking the patent in suit. Hearing a witness is a suitable and normal practice for proving an instance of prior use and therefore does not constitute a special situation.

(ii) The witness confirmed that he had no personal interest in the outcome of the proceedings and therefore it was irrelevant that he was an employee of the opponent.

(iii) The witness was not influenced by the opponent - he was alone in the room during his hearing.

(c) The witness explained that the prior use was public. Furthermore, the opposition division's decision was not only based on the witness's testimony but also on the following further pieces of evidence:

A2 Internet press release entitled "*Michelin Shrinks Its eTire Pressure Monitor*"
A2'' Brochure entitled "*MICHELIN eTire II System*"
A27 Blog by Rich Helms entitled "*Running with the big dogs*"

(d) The opposition division correctly deduced from all of the evidence on file, including the witness hearing, that the prior use "eTire II" was public.

(e) Claim 1 of the main request was not novel over the prior use "eTire II", as held by the board in T 0393/16. The same applies to auxiliary requests 1 - 4, whereas auxiliary request 5 was rendered obvious by the prior use "eTire II" in combination with the knowledge of the skilled person.

Reasons for the Decision

Hearing of the witness, Mr Marques, by videoconference

1. Article 117(1)(d) and Rule 117 EPC provide a legal basis for hearing a witness by videoconference.

1.1 The President of the EPO stated in the "Notice from the European Patent Office dated 10 November 2020 concerning oral proceedings before examining and opposition divisions, and consultations, by videoconference" that all oral proceedings before

opposition divisions shall be carried out in the form of a videoconference unless there are serious reasons for not doing so.

1.2 In a decision dated 15 December 2020, the Administrative Council decided to amend Rules 117 and 118 EPC to allow evidence to be taken by videoconference in proceedings before the EPO. The amendment took effect as of 1 January 2021 (i.e. before the hearing of Mr Marques).

This decision of the Administrative Council was published in OJ 2020, A132, and was explained to the public in the "Notice from the European Patent Office dated 17 December 2020 concerning the taking of evidence by videoconference by examining and opposition divisions" (which was published in OJ 2020, A135). In particular, paragraph 2 of this Notice indicates that if oral proceedings are held by videoconference, evidence must be taken by videoconference as well.

1.3 Hearing a witness by videoconference is hence an alternative to hearing a witness in person, which is provided for within the relevant legal framework of the EPC.

2. Hearing the witness by videoconference did not infringe the appellant's right to be heard (Article 113(1) EPC).

2.1 During oral proceedings, participants interact based mainly on arguments that are expressed orally. The same applies to the interaction with a witness when the opposition division (and the parties) pose questions that are answered by the witness.

2.1.1 Both the appellant and the respondent agreed that they had the opportunity to ask questions to the witness in addition to the opposition division. They also had the opportunity to argue their case on the question of whether the prior use was public before the opposition division decided on the issue.

2.1.2 Thus, hearing a witness by videoconference does not substantially limit the interaction between the opposition division, the parties and the witness compared to hearing a witness in the courtroom.

2.2 The appellant, however, argued that it was not able to observe the witness's body language during his hearing, and therefore it had been deprived of the opportunity to objectively judge his credibility. This allegedly amounted to an infringement of its right to be heard.

2.2.1 Firstly, it should be noted that it is the deciding body's responsibility, not the parties', to judge the personal credibility of a witness and the plausibility of a witness's statement.

Thus, the department hearing the witness has to assess thoroughly whether it deems itself able to properly make a judgement on these issues despite the fact that it won't be able to see the witness's whole body and that a person heard at a familiar location via videoconference might feel more comfortable and less affected by the situation than a witness heard in a courtroom. Thus, there might be cases where hearing witnesses in person is the better choice, whether because the alleged facts in respect of which one or more witnesses are to be heard deviate from evidentiary assertions by other parties or from facts which follow

from other evidence on file, or for other reasons.

However, it is up to the relevant department to decide which possible way to hear a witness to choose (by members of the department or by a national court, Article 131 and Rule 120 EPC; by the whole department or by one of its members, Rule 119(1) EPC; by videoconference or in person, Rule 117 EPC) (Article 117(2) and Rule 117 EPC). It is also the department's responsibility to carry out the investigation.

In the present case, the opposition division decided to hear the witness by videoconference and hence considered itself able to make a judgement to a sufficient degree on the credibility of the witness, despite the witness hearing taking place by videoconference.

The parties do not play a central role in this process. They do have, according to Rule 119(3) EPC, the right to attend an investigation and they may put relevant questions to the testifying witness. In the present case, the parties had the opportunity to ask the witness questions and did indeed ask the witness questions; this was not contested by the appellant.

2.2.2 Secondly, the credibility of a witness is not determined based largely on their body language and even less on body language outside the frame visible in a videoconference. On the contrary, the credibility of a witness depends primarily on the plausibility and conclusiveness of their testimony and the absence of contradictions, in particular contradictions within the witness's own testimony, but also contradictions between the testimonies of several witnesses and/or

contradictions between the witness's testimony and supporting documents or other evidence on file.

Whether the witness's statement is free of contradictions and is in accordance with the information derivable from supporting documents A2, A2'' and A27 was discussed during the oral proceedings and was considered by the opposition division during the evaluation of the witness's testimony and credibility (see the decision under appeal, sections 4.2.4, 4.2.5 and 4.2.6).

2.2.3 Thirdly, most of the body language relevant for determining secondary information such as whether a witness is nervous or feels uneasy when responding to specific questions can be perceived in the camera-section visible to the other participants of the videoconference anyway. Facial reactions, and the way the witness answers questions (e.g. reluctantly, self-confidently or too quickly and without reflecting), can often be seen in even greater detail when choosing speaker-view on a screen, as compared to watching a witness from several metres away in a courtroom. Movements of the body outside the camera image section, like trembling knees (if such a thing can be expected during a patent case), may cause movements of other, visible, parts of the body.

The appellant did not give any reason related to the present case as to why the body language not visible during the videoconference could have influenced the opposition division's decision such that it would have come to a different conclusion on the witness's credibility.

2.2.4 However, even if part of the body language could not be seen, this drawback could never affect a party's right to be present and to put questions to the witness (Rule 119(3) EPC) to such an extent that its right to be heard, i.e. the "opportunity to present comments on grounds or evidence" (Article 113(1) EPC), is violated. This opportunity is also given during a videoconference. Such a format does not significantly limit the possibilities of interaction with the witness, which is mainly based on an oral exchange of questions and answers as set out above.

2.2.5 As also stated above in section 2.2.1, it is, then, the responsibility of the department and not of the party to evaluate the evidence and judge the witness's credibility. Should a department feel that a hearing in person is indispensable, it could still summon the witness *in personam* in a similar manner to the Convention's provision of the option to have a witness re-heard under oath before a national court (Rule 120(2) EPC).

2.3 The above considerations with regard to hearing a witness by videoconference do not - contrary to the appellant's allegation - contradict decision G 1/21 of the Enlarged Board of Appeal.

2.3.1 G 1/21 sets out in Reasons 40 that oral proceedings held by videoconference are normally sufficient to comply with the principle of fairness of proceedings and the right to be heard. Oral proceedings held by videoconference allow adequate interaction between the participants based on orally expressed arguments. The Enlarged Board of Appeal hence shares the board's position expressed in section 2.2 above.

2.3.2 The Enlarged Board held that a participant's body language is only an additional side-effect, and therefore its absence still allows sufficient interaction between the participants (see Reasons 42 of G 1/21). The same is true in the case of a witness hearing with regard to providing answers to the posed questions.

2.3.3 Furthermore, the Enlarged Board emphasised that unlike telephone conferences, a videoconference allows a major part of the participant's body language to be seen since their face and the upper part of their chest are visible to all participants of the hearing, albeit on a screen (see Reasons 41 of G 1/21). The current technical possibilities are even better than at the time the Enlarged Board's decision was given and do not hinder the participants of a videoconference in terms of the way they act and react and in terms of perceiving body movements and face colour and changes thereof.

Thus, under the current conditions it cannot be assumed that the Enlarged Board of Appeal would have considered there to be a general obstacle against holding a witness hearing via videoconference.

2.3.4 Whether G 1/21 requires a general emergency in order to hear a witness by videoconference contrary to the parties' requests, does not have to be addressed since G 1/21 does not concern oral proceedings in opposition proceedings nor taking of evidence but instead is limited to oral proceedings in appeal proceedings (see referred question in Reasons 20 of G 1/21).

2.3.5 The appellant's argument that it could not fully follow the witness's body language therefore might be true.

However, it does not significantly hinder the party's right to be present and to put relevant questions to the witness.

2.3.6 Whether the opposition division feels in a position to adequately judge the credibility of the witness is another question and one which has to be answered by the opposition division. In the case at hand, it apparently did so and gave reasons why the witness seemed to be credible and why his statement seemed plausible (see also section 3. below).

2.4 The appellant's right to be heard was thus not infringed by the witness being heard by videoconference.

2.5 Since no substantial procedural violation is apparent, the appellant's request for reimbursement of the appeal fee is not accepted.

3. The question remains whether the opposition division made an error of judgement when deciding to hold the witness hearing by videoconference.

3.1 The "Notice from the European Patent Office dated 10 November 2020 concerning oral proceedings before examining and opposition divisions, and consultations, by videoconference" of the President of the EPO allows deviations from the standard of holding oral proceedings by videoconference if "*there are serious reasons against holding them by videoconference*" (see Article 2(2) of that notice).

3.2 In the opposition proceedings, the appellant argued at the bottom of page 2 of its letter dated 30 July 2021 that:

"*(T)the outcome of the opposition proceedings will basically solely depend on whether "eTire II" is a public prior use disclosing the claimed subject matter or not, which is to be assessed on the basis of the statements of the witness.*
The statements of the witness and the reliability and credibility of the statements of the witness, who is an employee of the Opponent, are thus crucial for the outcome of the oral proceedings scheduled on Sept. 21-22, 2021.
Therefore, the hearing [of] the witness and the assessment of the statements of the witness is extremely important in this case, and Patentee submits that it is essential that the witness is heard and appears in person before the Opposition Division to get a personal impression of the witness and to ensure a direct and uninfluenced interaction with the witness in the premises of the EPO. Hearing a witness via video-conference is not equivalent to a personal hearing in Patentee´s view in that respect."

3.3 The mere fact that the prior use anticipates the claimed subject-matter (if sufficiently proven that it was public) is the default and not the exception when it comes to taking evidence, regardless of the form of the witness hearing. The prior use must be relevant for the outcome of the proceedings, which is also a prerequisite for issuing a decision on the taking of evidence according to Rule 117 EPC. Otherwise, the opposition division would not examine it and summon the witness.

The "importance" of the prior use and the fact that the outcome of the case hinges on the question of whether this prior use was public therefore cannot constitute a

"serious reason" within the meaning of the President's notice preventing the opposition division from hearing the witness by videoconference.

3.4 A sufficiently direct and uninfluenced interaction with the witness to evaluate his credibility is - as set out above - also possible when the witness is heard by videoconference. The interaction occurs orally and only a minor part thereof is based on body language that is not visible on the screen.

Once again, this is not a special reason within the meaning of the President's notice that would justify a witness hearing in person.

3.5 The appellant further alleged during the appeal proceedings that a special reason would be the witness being an employee of the opponent and being located in the opponent's office during his hearing.

This, however, was not alleged by the appellant during the opposition proceedings, and therefore the opposition division was not given the opportunity to consider these arguments. In the passage of the appellant's letter cited verbatim above which allegedly contains this argument, the opponent only mentioned that the witness is an employee of the opponent; it did not draw any conclusions from this.

Furthermore, the minutes of the taking of evidence show that the opposition division took this question into consideration during the hearing by specifically asking the witness whether he had any personal or economic interest in the outcome of the proceedings (see the minutes of the taking of evidence, page 4). The appellant, however, did not ask any questions on this,

nor did it complain during the hearing that the witness being an employee of the opponent would cast doubt as to his credibility.

The appellant's argument that the witness was located in the opponent's office during his hearing was not raised during the opposition proceedings either. There is no mention in the minutes or in the decision of the opposition division that the appellant complained about the witness being in the opponent's office when this became apparent during the hearing. The minutes of the taking of evidence furthermore show (see pages 2 and 3) that the opposition division made sure that the witness was sitting alone in the room so that he could not be influenced by another person in the course of his testimony, as prescribed in point 8 of the communication from the EPO dated 17 December 2020 concerning the taking of evidence by videoconference by examining and opposition divisions.

3.6 There was also no indication for the opposition division that the testimony might contradict other evidence on file or the statements of other witnesses to be heard, nor were there other warning signs that might have prompted the opposition division not to hold the hearing via videoconference. The mere fact that the witness was an employee of the opponent did not necessarily cast doubts on the witness's reliability that were serious enough for a hearing by videoconference to be ruled out.

3.7 It is therefore not credible that the opposition division did not consider all available arguments when it did not concede special reasons within the meaning of the President's notice. The decision to hear the witness by videoconference was therefore not erroneous.

4. The appellant further argued that the opposition division erred in considering the prior use to have occurred in public. In its opinion, the company Challenger was bound by a secrecy agreement such that the prior use "eTire II" should be disregarded.

4.1 The opposition division held - taking all available information into account - that Challenger was not bound by a secrecy agreement, and that therefore the prior use occurred in public (see Reasons 4.2.3), and it gave reasons for its decision (see Reasons 4.2.4 - 4.2.6).

4.2 Regarding the review by a board of the evaluation of evidence carried out by a deciding body of first instance, the board notes that the principle of free evaluation of evidence applies to all departments of the EPO and thus also impacts the review in appeal proceedings.

The board therefore adheres to its practice set out in T 1418/17, Reasons 1.3. Unless the law has been misapplied (e.g. if the wrong standard of proof has been applied), a board of appeal should overrule a department of first instance's evaluation of evidence and replace it with its own only if it is apparent from that department's evaluation that it:

(i) disregarded essential points,

(ii) also considered irrelevant matters or

(iii) violated the laws of thought, for instance in the form of logical errors and contradictions in its reasoning (see T 1418/17, Reasons 1.3).

This does not contradict the findings in T 1604/16 that the review of a board is not limited to points of law but extends to points of fact (see Reasons 3.1.7), as set out in T 42/19 (see Reasons 3.3).

In the current case, the board sees no reason not to adhere to the evaluation of evidence by the opposition division, keeping in mind that it is a process that is first and foremost entrusted to the deciding body that has to weigh all the available and relevant evidence and give reasons why it is convinced that a certain fact is proven or not.

4.3 In the current case, the opposition division had a first-hand impression of the probative value of the witness testimony, which is not available to the same extent to the board. Based on this witness testimony and the supporting documents on file, the opposition division logically explained why it deemed the prior use to have occurred in public. The reasoning took into account the essential points and did not consider irrelevant matter. Moreover, the board is not aware of any argument raised by the appellant during the opposition proceedings that was not considered by the opposition division.

4.4 There is therefore no reason to deviate from the evaluation of evidence by the opposition division and re-evaluate the testimony, or hear the witness again. Instead, the board bases its decision on the facts established by the opposition division, namely that the system "eTire II" was used by the company Challenger, anticipating all of the features of the claimed invention, and that the employees of Challenger were not bound by a secrecy agreement. The board thus shares

the legal conclusion that a prior use of the claimed invention occurred in public.

Referral of a question of law to the Enlarged Board of Appeal

5. The board does not consider it necessary to refer the question of law formulated by the appellant (cf. section III(a) of the Facts and Submissions) to the Enlarged Board of Appeal.

5.1 Under Article 112(1)(a) EPC, a referral of questions to the Enlarged Board of Appeal is only admissible if a decision is required to ensure uniform application of the law or if a point of law of fundamental importance arises. The answer to the referred question should not be merely of theoretical or general interest; rather, it must be essential for reaching a decision on the appeal in question (see, for example, G 3/98 (OJ EPO 2001, 62), Reasons 1.2.3, or Case Law of the Boards of Appeal, 10th edition, V-B.2.3.3).

Under Article 21 RPBA 2020, a question is to be referred to the Enlarged Board of Appeal if the referring board considers it necessary to deviate from an interpretation or explanation of the Convention contained in an earlier opinion or decision of the Enlarged Board of Appeal.

5.2 The board does not consider a decision of the Enlarged Board to be required for the above purposes.

5.2.1 The board does not intend to deviate from an earlier decision of the Enlarged Board of Appeal (see section 2.3 above).

5.2.2 There is also no conflicting case law of the boards of appeal as alleged by the appellant.

5.2.3 Finally, the question is neither of fundamental importance nor relevant for a uniform application of law.

The circumstances of the witness hearing defined in the question are very specific (hearing by videoconference, witness is an employee of the opponent, witness is located at the opponent's office during the hearing) and hence will not apply to the majority of witness hearings during first-instance proceedings.

Main request

Novelty over the prior use "eTire II" (Article 54 EPC)

6. The subject-matter of claim 1 is anticipated by the prior use "eTire II".

6.1 As the board held in decision T 0393/16, the subject-matter of claim 1 is not novel over the prior use "eTire II" (see the entirety of paragraph 1 of the Reasons of T 0393/16).

6.2 The appellant did not challenge this decision; it only argued that the prior use was not public and hence was not prior art under Article 54 EPC.

6.3 The board - as set out above - sees no reason to re-evaluate the evidence on file and in particular the hearing of the witness. Instead it accepts the opposition division's decision that the prior use occurred in public.

6.4 There is therefore no reason to deviate from the opposition division's decision that the main request does not comply with Article 54 EPC.

Auxiliary requests 1 - 5

7. With regard to auxiliary requests 1 - 5 (which correspond to the auxiliary requests on which the decision of the opposition division was based), the board notes that the appellant did not identify errors in the opposition division's decision but instead merely referred to the entirety of its arguments presented in the first-instance proceedings and the summary of these arguments given by the opposition division (see sections 5 - 9 of the statement of grounds of appeal).

7.1 Appeal proceedings are not intended to be a continuation of first-instance proceedings. The primary object of the appeal proceedings is to review the decision under appeal in a judicial manner (see Article 12(2) RPBA 2020). Hence, it is up to the appellant to identify flaws in the appealed decision.

7.2 The unspecific reference to the entire contents of a letter filed during first-instance proceedings does not allow the specific errors of the opposition division in its decision to be inferred. The same applies to a summary of all of the arguments raised by the appellant with regard to the auxiliary requests; the board is unable to distinguish which of these arguments was convincing but not accepted by the opposition division.

It is not the board's responsibility to re-examine the entire case as presented by the parties in the opposition proceedings.

7.3 Thus, the board is not aware of any reason why it should deviate from the opposition division's decision with regard to auxiliary requests 1 - 5.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

A. Vottner G. Pricolo

Decision electronically authenticated